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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible] 566

THE TROY BANK OF TROY, INDIANA, AND OTHERS, APPELLANTS,

v.

G. A. WHITEHEAD & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE [illegible] DISTRICT OF KENTUCKY.

(22,614.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 993.

THE TROY BANK OF TROY, INDIANA, AND JOHN BEIDENKOPF, APPELLANTS,

vs.

G. A. WHITEHEAD & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 20, 1911.

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1 Proceedings in the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division, at a Regular Term Began and Held at the Federal Court Hall in the City of Owensboro on Monday, November 28th, 1910.

Present: Honorable Walter Evans, sitting as Circuit Judge.

THE TROY BANK OF TROY, INDIANA, et al., Complainants,
vs.
G. A. WHITEHEAD et al., Defendants.

Be it remembered, that heretofore, to-wit, on the 20th day of August, A. D. 1910, came the plaintiff, The Troy Bank, of Troy, Indiana, and John Biedemkopf, by George W. Jolly, their solicitor, and filed in the Clerk's office of our said Court, their Bill In Equity against the above named defendants.

The Bill In Equity above referred to is as follows:—

2 In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division.

THE TROY BANK OF TROY, INDIANA, and JOHN BIEDENKOPF, Complainants,
vs.
G. A. WHITEHEAD and G. A. WHITEHEAD & COMPANY, Defendants.

Bill in Equity.

To the Honorable Judges of the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division:

I. The Troy Bank, of Troy, Indiana, a corporation created, organized and existing under the laws of the State of Indiana, and a citizen of said State, and having its principal place of business at the town of Troy, in said State, and John Biedenkopf, also a citizen of said State of Indiana, and residing at the town of Grand View in said State, brings this bill against G. A. Whitehead, a citizen of the State of Kentucky, and residing at the City of Owensboro, in said State; and G. A. Whitehead & Company, a corporation, created, organized and existing under the laws of the State of Kentucky, and having its principal place of business at the City of Owensboro, in said State of Kentucky.

II. (a) And thereupon your orators complain and say that, heretofore, to-wit on the 18th day of July, A. D. 1908, the defendant G. A. Whitehead, signed and delivered to one Henry W. Eigemann, a writing which is herewith filed marked "A", and made part of this

bill, whereby said Whitehead agreed and promised to pay to the order of said Eigenmann the sum of Twelve Hundred Dollars ($1200.00) twelve months thereafter, which writing is in the following words and figures, to-wit:

3 "$1200.00. ROCKPORT, IND., *July 18th*, 1908.

Twelve months after date I promise to pay to the order of Henry W. Eigenmann, office of H. W. Eigenmann, Rockport, Ind., Twelve Hundred Dollars. Value Received, without any relief from valuation or appraisement laws, with interest at six per cent per annum from date until paid. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note.

G. A. WHITEHEAD."

And your orators further say that, before the maturity of said note, namely on the 21st day of July, A. D. 1908, the complainant, Troy Bank, bought and discounted said note for a valuable consideration, in the regular course of its business, and said payee, Henry W. Eigenmann, wrote his name across the back of said note and delivered the said note to said Bank and it then became and is now the owner and holder thereof.

II. (*b*) And your orators further say that, on the said 18th day of July, A. D. 1908, the defendant, G. A. Whitehead, signed and delivered to one Henry W. Eigenmann, a certain writing which is herewith filed as part of this bill marked "B," whereby said Whitehead agreed and promised to pay to the order of said Eigenmann, the sum of Twelve Hundred dollars ($1200.00) twenty four months thereafter, which said writing is in the following words and figures, to-wit:—

"$1200.00. ROCKPORT, IND., *July 18th*, 1908.

Twenty four months after date I promise to pay to the order of Henry W. Eigenmann, office of H. W. Eigenmann, Rockport, Ind., twelve Hundred Dollars. Value received, Without any relief from valuation or appraisement laws with interest at 6 per cent per annum from date until paid. The drawers and endorsers severally waive presentment for payment protest and notice of protest and non-payment of this note.

"G. A. WHITEHEAD."

4 And your orators further say that, before the maturity of said note, namely on the 21st day of July, A. D. 1908, the said Henry W. Eigenmann for a valuable consideration indorsed said note by writing his name on the back thereof, and delivered the said note to the complainant, John Beidenk-pf, and said Beidenkopf then and there paid a full and valuable consideration therefor to said Eigenmann, and he has been since said date, and now is the owner and holder thereof.

III. And your orators further say that, heretofore, to-wit, on the 18th day of July, A. D. 1908, one Henry Eigenmann (the same

Henry Eigenmann mentioned in the first paragraph of this bill, in sub paragraphs "*a*" and "*b*") and one Grace Eigenmann his wife, by a deed in writing which they signed, acknowledged and delivered to the defendant, G. A. Whitehead, and which is herewith filed as part of this bill, marked "C", granted, bargained, sold and conveyed and warranted to said defendant, Whitehead two certain lots or parcels of ground adjoining each other, situate, lying and being in the City of Owensboro, County of Daviess and State of Kentucky, and more particularly described as follows, to-wit:—

(1) Lot No. 1—Beginning at the mouth of the ravine and running thence down the river (Ohio river) to the lot formerly owned by T. C. Loud (now deceased) thence with Loud's line southward to the bank of the Ravine; thence down the Ravine to the point of beginning, containing one and one half acre, more or less.

(2) Lot No. 2—Beginning 267 feet north of the north line of Main Street, the northwest corner of Main and Locust streets in said (city, that is the City of Owensboro,) in the west margin of Locust Street, near the center of the Ravine; thence in a westwardly direction to the east margin of Mulberry street to a stake 147½ feet north of the northeast corner of Mulberry street and Main street, all that part — lots Nos. 5 and 6 in Scarborough's addition to the City of Owensboro, lying north of said described line between Locust, Mulberry and North Ravine Streets.

From the above bound-ries is exempted and excepted a certain lot with a house thereon in the western end of said property which was sold by the Owensboro Planing Mill Company to Frankie Amback on May 8th, 1903, by deed recorded in Deed Book No. 77 page 15 in the Daviess County Court Clerk's Office.

This is the same property conveyed to the Owensboro Planing Mill Company by Cary and Marble and others by deed acknowledged September 15th, 1902, and recorded in Deed Book No. 74, page 418 in said Daviess County Court Clerk's office, and by the Owensboro Planing Mill Company to the said Henry W. Eigenmann by deed dated April 2nd, 1906, and of record in said County Court Clerk's office in Deed Book No. 85, page 20."

5 And your orators further state that, the consideration for said lots of ground heretofore described, was the sum of one dollar and the assumption on the part of the grantee in said deed, the defendant, G. A. Whitehead, of the payment of the sum of Three Thousand and six hundred dollars, then owing by said Henry W. Eigenmann to the said Owensboro Planing Mill Company, and the further agreement on the part of said G. A. Whitehead to pay to the said grantor, Henry W. Eigenmann the further sum of Two Thousand four Hundred dollars, being the unpaid purchase money for said conveyance of said lots and parcels of ground above described, due and payable in two equal installments in one and two years respectively from the date of said deed, namely, one and two years from said 18th day of July, A. D. 1908, and bearing six per cent interest from said date until paid, and which said unpaid purchase money, namely, said $2400.00 was further evidenced by the two promissory notes of the grantee, said G. A. Whitehead executed

to the said grantor, Henry W. Eigenmann, agreeable in tenor, amounts and maturities of said lien reserved in said deed; which facts fully appear by recitations in said deed, which said deed after being signed, acknowledged and delivered as aforesaid to said Whitehead was by him lodged for record and recorded in the Clerk's office of the said Daviess County Court, on the 20th day of July, A. D. 1908, in Deed Book, No. 85, at page 22 thereof.

And your orators further state that, afterwards, to-wit, on the 21st day of July, A. D. 1908, said Henry W. Eigenmann went into said Clerk's office and, in the presence of the Deputy Clerk of the clerk of said Daviess County Court, made and caused to be made in the margin of said Deed Book No. 85 at page 22, an entry in words and figures as follows, to-wit:

"July 21-st, 1908.—For value I hereby assign the within vendor's lien as to the note for $1200.00 maturing in one years after July 18th 1908, to the Troy Bank of Troy Indiana, and as to the note for $1200.00 maturing in two years after July 18th, 1908, I assign the within vendor's lien for value to John Biedenkopf of Grand View Indiana.

HENRY W. EIGENMANN.

Att.:

R. E. HAWES, *D. C.*

1:20 *A.* M. July 21st, 1908."

6 Your orators further say that, said two notes filed herewith as parts of this bill were executed for the unpaid balance of purchase money owing by said Whitehead to said Eingenmann for said two lots hereinbefore described, and are the two notes mentioned in said deed from said Eigenmann to said Whitehead, and a lien exists and was expressly retained in said deed on said lots of ground to secure the payment of said two notes and each of them.

And your orators further say, that, no part of said debts of $1200.00 each, amounting to $2400.00 with interest from July 18th, 1908, has ever been paid. And that the said lots on which said lien exists and was retained, for the unpaid purchase money for which said notes were executed is of the value of $10,000.00, and the lots are used for manufacturing purposes and cannot be further divided without materially impairing their value.

And your orators further say that, heretofore, and after the 18th day of July, A. D. 1908, namely, on the 28th day of September, A. D. 1909, the defendant, G. A. Whitehead, and Bertha P. Whitehead, his wife, made, executed and delivered to the defendant, corporation, G. A. Whitehead and Company, a deed conveying to said defendant Company said lots and parcels of ground hereinbefore described, on which the complainants have a lien, to secure the payment of said debts and interest, and said Company is now in the possession and control of the same. A copy of said deed is herewith filed as part hereof marked "D".

May it please your Honors to grant unto your orators a writ of subpœna of the United States of America, directed to the said de-

fendants, G. A. Whitehead, and G. A. Whitehead and Company, commanding them to appear and answer, but not under oath—answer under oath being hereby waived, unto this bill of complaint and to abide and perform such order and decree in the premises as to the Court shall seem meet and be required by the princi-
7 ples of equity and good conscience.

Wherefore, your orators pray the Honorable Court for a judgment and decree in their favor enforcing the said lien created and existing on said lots of land to secure the payment of their said debts, amounting to $2400.00, the one of $1200.00 in favor of the complainants, the Troy Bank of Troy Indiana, and the other of a like amount of $1200.00, in favor of the complainant John Biedenkopf, with interest on each debt from the 18th day of July, A. D. 1908, until paid, and for a sale of said lots of land, or so much thereof as may be necessary to pay said debts and interest and the costs of this suit, and of sale; for a judgment against defendant, Whitehead, for the same, if necessary, and for all such other and further relief as may be deemed by the Court necessary or proper, or the justice of the case may require.

GEORGE W. JOLLY,
Solicitor for Complainants.

UNITED STATES OF AMERICA,
Western District of Kentucky,
Owensboro Division, set:

This day personally appeared before me, George W. Jolly, who being duly sworn says he is agent and solicitor for the complainants in the above-styled suit, and that the complainants and each of them are absent from this Division and District, and he further says that the facts set forth in the foregoing bill, so far as they purport to be stated as of the knowledge of the complainants, are true, and so far as they purport to be stated on information and belief he believes them to be true.

GEORGE W. JOLLY.

Subscribed and sworn to before me by George W. Jolly, this 17th day of August, A. D. 1910.

[SEAL.] M. L. OGDEN,
Notary Public, Daviess County, Ky.

My Commission Expires Feb. 2, 1914.

8 Exhibits A, B, C, D. and E filed with the Bill of Complaint are as follows:

"A."

"$1200.00. ROCKPORT, IND., *July 18th*, 1908.

Twelve months after date I promise to pay to the order of Henry W. Eigenmann, office of H. W. Eigenmann, Rockport, Ind., Twelve Hundred Dollars. Value Received, without and relief from valua-

tion or appraisement laws, with interest at six per cent per annum from date until paid. The drawers and endorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note.

G. A. WHITEHEAD."

The above note is endorsed on the back "Henry W. Eigenmann."

The following note is endorsed on the back, "Henry W. Eigenmann,"

"B."

"$1200.00. ROCKPORT, IND., *July 18th*, 1908

Twenty four months after date I promise to pay to the order of Henry W. Eigenmann, office of H. W. Eigenmann, Rockport, Ind., twelve Hundred Dollars. Value received, Without any relief from valuation or appraisement laws with interest at 6 per cent per annum from date until paid. The drawers and endorsers severally waive presentment for payment protest and notice of protest and non-payment of this note.

"G. A. WHITEHEAD."

9 "C."

This indenture Witnesseth, That Henry Eigenmann and Grace Eigenmann, his wife, of Spencer County, in the State of Indiana, convey and warrant to George A. Whitehead, of Owensboro, Daviess County, in the State of Kentucky, for the sum of One Dollar, and other valuable considerations, the following real estate in Daviess County in the State of Kentucky, to-wit:—

Two lots of ground in the City of Owensboro bounded and described as follows: Lot No. 1 beginning at the mouth of the Ravine and running thence down the river to T. C. Loud's lot; thence with Loud'*d* line southward back to the said ravine; thence down the ravine to the point of beginning, and containing 1½ acres, more or less.

Lot No. 2. Beginning 267 feet North of the north line of Main street the northwest corner of Main and Locust streets in said City in the West margin of Locust street near the center of the ravine, thence in westwardly direction to the east margin of Mulberry street to a stake 147½ feet north of the north east corner of Mulberry and Main Streets, all that part of lots Nos. 5 and 6 in Searbrough's Addition *oo* Owensboro lying north of said described line between Locust, Mulberry, and North Ravine Streets. From the above bound-ries is exempted and excepted a certain lot with a house thereon in the western end of said property which was one time sold by the Owensboro Planing Mill Company to Frankie Amback, on May 8, 1903, by deed recorded in deed book 77 at page 15 in the County Clerk's office. This is the same property conveyed to the Owensboro planing Mill Company by Cary & Marble et al. by deed

acknowledged September 15th, 1902, and recorded in deed book 74 at page 418 in the County Court Clerk's office, and by the Owensboro Planing Mill Company conveyed to the party of the first part herein by deed of date April 2d, 1906, and of record in deed book No. 85 at page 20, in the Daviess County Court Clerk's office.

The grantee herein assumes and agrees to pay as a part of the consideration for this conveyance the vendor's lien reserved and described in said last above mentioned deed by the Owensboro Planing Mill Co. for $3,600.00 with interest. The Grantor hereby reserves unto himself a vendor's lien on the above described real estate for $2400.00 being the unpaid purchase money for this conveyance due in two equal installments in one and two years respectively from the date hereof and bearing six per cent interest from date until paid which unpaid purchase money is further evidenced by the two promissory notes of the grantee executed to the grantor H. W. Eigenmann agreeable in tenor, amounts and maturities to the lien herein reserved.

In witness whereof the grantors Henry W. Eigenmann and Grace Eigenmann his wife, have hereunto set their hands and seals this 18th day of July, A. D. 1908.

HENRY W. EIGENMANN. [SEAL.]
GRACE EIGENMANN. [SEAL.]

STATE OF INDIANA,
Spencer County, ss:

Before me, W. N. Smith, a Notary Public, in and for said County this 18th day of July, 1908, personally appeared H. W. Eigenmann and Grace Eigenmann, his wife, and acknowledged the execution of the foregoing deed and I hereby further certify that the terms, import and meaning effect of this deed were by me explained to the said Grace Eigenmann after same had been read to her and separate and apart from her husband H. W. Eigenmann, and that she did then and there separate and apart from her said husband sign and acknowledge this deed and voluntar-y deliver same as her act and deed.

Witness my hand and official seal.

W. M. SMITH. [SEAL.]
Notary Public.

My Com. Expires Aug. 7, 1909.

STATE OF KENTUCKY,
Daviess County, set:

On this day the same was lodged and together with this and the foregoing certificate duly recorded in my office.

Witness my hand this 20th day of July, 1908.

E. P. TAYLOR, *Clerk.*

The following assignment appears on the margin of the above deed:

July 21st, 1908. For value I hereby assign the within vendors' lien as to the note for $1200.00 maturing in one year after July 18th, 1908, to the Troy Bank of Troy, Indiana, and as to the note for $1200.00 maturing in two years after July 18th, 1908, I assign the within vendors' lien for value to John Biedenkopf, Of Grandview, Indiana.

HENRY W. EIGENMANN.

Att.: R. E. Hawes, D. C. at 1:20 A. M. July 21/08. Recorded in Deed Book 85, page 22. A copy attest: E. P. Taylor, Clerk, by P. M. Dinkelspeel, Deputy Clerk.

11 "D."

This deed made and entered into this 28th day of September, 1909, by and between G. A. Whitehead and Bertha P. Whitehead, his wife, of Owensboro, Daviess County, Kentucky, parties of the first part, and G. A. Whitehead and Company incorporated, a corporation under the laws of the State of Kentucky, whose post office address is Owensboro, Kentucky, party of the second part,

Witnesseth:—That for and in consideration of the sum of Eight Thousand Five hundred dollars ($8500.00) paid and to be paid as follows: Two Thousand dollars ($2000.00) cash in hand paid, the receipt of which is hereby acknowledged, and the further sum of Six thousand five hundred dollars ($6500.00) due and payable twelve months after date, for which a note of even date herewith is executed payable to said G. A. Whitehead, and to secure which a lien is hereby retained on the real estate hereinafter conveyed, the parties of the first part G. A. Whitehead and Bertha P. Whitehead, his wife, hereby sell, alien and convey unto the said G. A. Whitehe*had* and Company Incorporated the following lots or parcels of real estate lying and being in the City of Owensboro, Daviess County Kentucky, with all improvements thereon and appurtenances thereto, and described as follows, to-wit:—

First lot. Beginning at the mouth of the ravine, and running thence down the rive- to T. C. Loud's lot; thence with Loud's line southward back to the said ravine; thence down the ravine to the point of beginning, and containing 1½ acres, more or less.

Second lot. Beginning 267 feet north of the north line of Mail Street at the northwest corner of Main and Locust St., in said city in the west margin of Locust St., near the center of the ravine: thence in a westwardly direction to the east margin of Mulberry St., to a stake 147½ feet north of the northeast corner of Mulberry and Main Streets, all of that part of lots #5 and #6 in Scarbough's addition to Owensboro lying north of said described line between Locust, Mulberry and North Ravine Streets. Being the same property which was conveyed to the party of the first part by

Cary & Marble et al. by deed acknowledged September, 15th, 1902, and recorded in deed book 74 at page 418, in the office of the clerk of the Daviess County Court.

12 From the above bound-ries is exempted and excepted a certain lot with a house thereon on the western end of said property which was by the party of the first part sold and conveyed to Frankie Ambach on the 8th of May, 1903, by deed recorded in deed book 77 page 15, in the office of the registration aforesaid. Being the same real estate conveyed to Henry W. Eigenmann by the Owensboro Planing Mill Company by deed of date April 2nd, 1906, and of record in deed book 85 at page 20, Daviess County Court Clerk's office, and conveyed by said Henry W. Eigenmann and Grace Eigenmann his wife to said G. A. Whitehead by deed of date July 18th 1908 and of record in deed book 85 at page 22, Daviess County Court Clerk's office.

To have and to hold said real estate together with all and singular its improvements and appurtenances unto the said G. A. Whitehead and Company incorporated, and its successors and assigns and legal representatives with covenant of General Warranty.

In Testimony Whereof, the parties of the first part hereunto subscribe their names this the day and date first above written.

G. A. WHITEHEAD.
BERTHA P. WHITEHEAD.

STATE OF KENTUCKY,
County of Daviess, sct:

I, Florene H. Cureton, Notary Public in and for the county and State aforesaid, do certify that the foregoing deed from G. A. Whitehead and Bertha P. Whitehead his wife to G. A. Whitehead and Company, incorporated, was this day produced to me in my county and acknowledged by G. A. Whitehead to be his act and deed.

Given under my hand and seal of office this the 15th day of September, 1909.

My commission expires January 29th, 1912.

FLORENCE H. CURETON,
Notary Public, Dav. Co., Ky.

STATE OF ALABAMA,
County of Jefferson, sct:

I, F. S. Dunlap, a Notary Public in and for the county and State aforesaid, do certify that the foregoing deed from G. A. Whitehead and Bertha P. Whitehead to G. A. Whitehead and Company, incorporated was on this day produced to me in my county by Bertha P. Whitehead in the absence of her husband and the contents

13 and import thereof explained to her by me and she did sign, execute and acknowledge same to be her act and deed.

Given under my hand and *sela* this 27th day of Sept. 1909.

F. S. DUNLAP, [SEAL.]
Notary Public.

Commission expires March 17, 1910.

STATE OF KENTUCKY,
Daviess County, sct:

And on this day the same was lodged and together with this and the foregoing certificate duly recorded in my office.
Witness my hand this 28th day of Sept. 1909.

E. P. TAYLOR, *Clerk.*

The unpaid purchase money herein mentioned having been paid in full the lien retained to secure same is now released. This April 20th, 1910.

G. A. WHITEHEAD.

Att.:
B. S. McCORMICK, *D. C.*

Recorded in Deed Book 87, page 49.
A copy attest:

E. P. TAYLOR, *Clerk,*
By P. M. DINKELSPEEL,
Deputy Clerk.

Upon which Bill of Complaint there issued the following Subpœna in Chancery:

14 The President of the United States of America to G. A. Whitehead and G. A. Whitehead & Company, Greeting:

You are hereby commanded to appear before our Circuit Court of the United States of America, for the Western District of Kentucky, Owensboro Division, at the Federal Court Hall, in the City of Owensboro on the First Monday in October next, to answer a Bill of Equity exhibited against them in our said Court, by The Troy Bank of Troy, Indiana, and John Beidenkopf which you shall in nowise omit, under the penalty of the law.
Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States of America and the seal of our said Circuit Court hereto affixed, at the Clerk's office of said Court, in Owensboro, this 22nd day of August A. D. 1910 and in the 135th year of our Independence.
Attest:
[SEAL.]

A. G. RONALD,
C. C. C. W. K. D.,
By HENRY F. CASSIN,
His Deputy Clerk.

Memorandum.

The defendant- are to enter their appearance in the suit in the Clerk's Office, on or before the 3rd day of October next, the day at which the writ is returnable, otherwise the bill may be taken pro confesso.

A. G. RONALD, *Clerk,*
By HENRY F. CASSIN,
Deputy Clerk.

[Endorsed:] Received the within subpœna in Chancery and two copies at Owensboro, Ky. August 23rd, 1910, and executed same in Owensboro, Ky., August 23rd, 1910 on the within named G. A. Whitehead & Co., by delivering a true copy hereof to Ben D. Ringo, president and highest officer of said Company found in my district. The within named G. A. Whitehead not found—is said to be in Chicago, Ill. P. O. Box 228. This August 23, 1910. Fees $2.00. G. W. Long, U. S. Marshal, by C. T. Nichols, Deputy U. S. M.

15 THE TROY BANK OF TROY, INDIANA, and JOHN BIEDENKOPF, Complainants,

vs.

G. A. WHITEHEAD and G. A. WHITEHEAD & COMPANY, Defendants.

And on another day of said term of said court, viz., on the 3rd day of October, A. D. 1910, the following order was entered, to-wit:

This day came the defendant, G. A. Whitehead & Company, by J. D. Atchison, their attorney and entered their appearance herein.

THE TROY BANK OF TROY, INDIANA, and JOHN BIEDENKOPF, Complainants,

vs.

G. A. WHITEHEAD and G. A. WHITEHEAD & COMPANY, Defendants.

And on another day of said term of said court, viz., on the 7th day of November, A. D. 1910, the following proceedings were had, to-wit:—

This day came the defendant, G. A. Whitehead & Company, by its counsel, J. D. Atchison, and filed a demurrer to the Bill of Complaint herein.

The demurrer of G. A. Whitehead & Company above referred to is as follows, to wit:—

16 Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division.

Demurrer of G. A. Whitehead and Company to Jurisdiction and to Complainants' Right to Maintain This Suit.

THE TROY BANK OF TROY, INDIANA, and JOHN BIEDENKOPF, Complainants,

vs.

G. A. WHITEHEAD and G. A. WHITEHEAD & COMPANY, Defendants.

The Demurrers of the Defendant, G. A. Whitehead & Company, to the Jurisdiction of this Court and to the Right of Complainants to Maintain this Suit.

This defendant, G. A. Whitehead & Company, by protestation, not confessing or acknowledging all or any of the matters or things

in said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, demurs to the said bill and for cause of demurrer says:—

1.

That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit, and that the said bill does upon its face show that the value of the subject matter of the complaint is beneath the dignity of the Court, in that it does not show that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

2.

That it does plainly appear upon the face of the bill that this Court has no jurisdiction of the sum sued for, in that the
17 bill upon its face shows that the complainant, John Biedenkopf, sued upon a separate and distinct note or obligation for $1200.00 and no more, and that the complainant, Troy Bank of Troy, Indiana, sues upon another separate and distinct note or obligation for $1200.00 and no more; and that separate decrees are in said bill prayed for by each of the complainants, and that it doeth also appear upon the face of said bill that the complainants have no joint interest in the two notes sued on.

3.

That it doeth plainly appear upon the face of said bill that neither of the notes sued on is placed upon, or is capable of being placed upon, the footing of a foreign bill of exchange under the statutes and laws of the State of Indiana, in which State, it appears from said bill, they were executed and delivered, made payable and assigned, and hence, it doeth appear upon the face of said bill that H. W. Eigemann, the assignor of John Biedenkopf, could not have sued in this Court upon the $1200.00 note assigned to him, neither could said Eigenmann, assignor of the Troy Bank of Troy, Indiana, have sued in this court upon the $1200.00 note assigned to it.

Wherefore, and for divers and other good causes of demurrer appearing in said bill, this defendant demurs thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to said bill, and it prays to be hence dismissed.

J. D. ATCHISON,
Solicitor for Defendant G. A. Whitehead & Company.

I hereby certify that the foregoing demurrers are, in my opinion, well founded in point of law.

J. D. ATCHISON,
Solicitor for Defendant G. A. Whitehead & Company.

18 WESTERN DISTRICT OF KENTUCKY,
County of Daviess, ss:

Ben D. Ringo makes oath and says that he is the president of the above named defendant, G. A. Whitehead & Company, and that the foregoing demurrers are not interposed for delay and that the same are true in point of fact.

BEN D. RINGO.

Subscribed and sworn to before me this the 4th day of November, 1910.

[SEAL.] WALLACE ATCHISON,
Notary Public for Daviess County, Kentucky.

19 And at another term of said court, held for its November Term, 1910, continued and held, viz., on the 28th day of November, A. D. 1910, the following order was entered, to-wit:—

This day came the plaintiff by George W. Jolly, its counsel. Came also the defendants by J. D. Atchison, their counsel. This cause coming on to be heard upon the defendants' demurrer to the complainants' bill of Complaint herein and having been argued by counsel and the court not being sufficiently advised thereof takes time.

And on another day of said term of said court, viz., on the 28th day of December, A. D. 1910, the following proceedings were had, to-wit:—

The Court being now sufficiently advised of the questions heretofore argued and arising upon the demurrer of the defendant, G. A. Whitehead & Company, to the bill of Complaint, delivered an opinion in writing which is filed, and pursuant thereto it is ordered, adjudged and decreed by the Court that each ground of the said demurrer should be and it is sustained and allowed. The complainants are given leave within twenty days to amend their bill, if so desiring, so as to make it show — what State Henry W. Eigenmann was a citizen when this action was commenced, and when the promissory notes sued on were transferred and assigned by him to the complainants respectively.

The opinion above referred to is as follows:—

20 United States Circuit Court, Western District of Kentucky, at Owensboro.

THE TROY BANK OF TROY, INDIANA, et al.
vs.
G. A. WHITEHEAD and Others.

Opinion.

It appears from the bill that on July 18th, 1908, one Henry W. Eigenmann and wife by deed conveyed to G. A. Whitehead certain

lands on Owensboro, Ky., in consideration, first, of $3600, which the grantee assumed to pay upon an indebtedness of the grantor to the Owensboro Planing Mill Company, and which was secured by a previously created and then existing vendor's lien on the property, and, second, of $2400, which latter sum was evidenced by two promissory notes executed by Whitehead to Eigenmann for $1200 each, one payable twelve months after date and the other twenty-four months after date. Subsequently Whitehead and his wife conveyed the lands to the defendant corporation. The bill of complaint gives no intimation as to whether the previous lien for $3600 has been discharged, nor if it has not, why the Owensboro Planing Mill Company was not made a party to the action, so that the existence and amount of that lien might be ascertained, and, if desired, a sale made subject thereto. The note due at twelve months was discounted by and transferred to complainant, The Troy Bank, and the other note was assigned to complainant Biedenkopf, and the two present owners of the notes have joined as complainants in this action and seek an enforcement of the vendor's lien reserved in the deed to Whitehead to secure the payment of the notes. The complainants also ask "for a judgment against defendant, Whitehead, for the same if necessary."

The corporation defendant, G. A. Whitehead & Company, has filed a demurrer to the bill, whereby three distinct objections are
21 taken to the jurisdiction of the Court. They are:

1st. That it does not appear, upon the face of the bill, and it is not shown, that the matter in dispute exceeds, exclusive of interests and costs, the sum or value of $2,000.

2nd. That it does appear upon the face of the bill that this Court has no jurisdiction of the action in that the complainant, Biedenkopf, sues upon a separate and distinct note for $1200, and no more, and that the complainant, the Troy Bank, sues upon another separate and distinct obligation for $1200 and no more, and that separate decrees are prayed in their favor respectively, and that they have no joint interest in the two notes.

Before noticing the third ground of demurrer it will be convenient to dispose of the first two, which may be treated together, as they depend largely if not altogether upon the same considerations.

Section 1 of the Judiciary Act provides, "That the Circuit Courts of the United States shall have original jurisdiction * * * of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and * * * in which there shall be a controversy between citizens of different States in which the matter in dispute exceeds" the sum or value aforesaid.

Here the complainants being citizens of Indiana and the defendants citizens of Kentucky, and the amount in dispute (which means the amount claimed in the bill) obviously exceeding $2,000 exclusive of interest and costs, the two statutory pre-requisites to the jurisdiction of this court are met, provided the claims of the complainants can be united so as to make up the amount in dispute. Whether, in order to maintain the jurisdiction of the court in this

case, we are at liberty to add together the separate claims of the complainants has been the subject of very industrious research and careful consideration.

Undoubtedly, unless the limited jurisdiction of the Federal courts prevents, the proper practice would be for both holders of the two promissory notes to join in the suit to enforce a lien in which, obviously, they have a common and an equal interest. 9th En-
22 cyclopedia of Pleading and Practice, 268-271. In no jurisdiction, probably, could the holder of either of the notes enforce his lien without making the holder of the other note a party to any suit filed for that purpose. Indeed each of the equal beneficiaries of the lien would be an indispensable party to the suit. If the holder of one of the notes sued and made the holder of the other note a defendant, the latter, by a cross bill, could join in a prayer for the appropriate relief. In this instance the vendor's lien was properly created under the law of Kentucky by the terms of the deed to Whitehead. That lien secured both notes—one as much as the other—and when the vendor assigned the notes and passed the title to one of them to the plaintiff bank and the title to the other of them to plaintiff Biedenkopf, the lien also thereby passed to the new holders of the notes though the ind*be*tedness continued to be the principal thing to which the lien was an incident. The title to one note passed altogether to the bank. The title to the other passed to Biedenkopf alone. Neither of them has any interest in the note not owned by him nor any interest in the money to be collected upon it. In other words, neither plaintiff either has or claims to have any interest in that part of the purchase money which must go to the other though each has an equal interest in the incident—the lien. Is the latter a joint interest or right sufficient to support the jurisdiction? is the question upon which the learned counsel have presented two separate lines of cases, many of which, in terms, relate to the appellate jurisdiction of the Supreme Court, but by analogy they indicate the rules for construing those provisions of the judiciary Act which fix the limits of the jurisdiction of the Circuit Courts. The first line (as we shall call it) of such cases is relied upon by the complainants in support of the jurisdiction, while the second of them is advanced in opposition thereto. Our effort has been to find the test by which to determine in which line this case should be placed. There could be no doubt of the jurisdiction if a trustee in whom the right to the lien had vested for the security of both notes had sued, for in that event his suit would have put the entire
23 indebtedness, thus secured, in litigation. Freeman vs. Dawson, 110 U. S. 264, New Orleans, &c., Ry. vs. Parker, 143 U. S. 50. Nor would there be any doubt in a case where one tax had been levied for the payment of several demands which in the aggregate exceed $2,000. Daviess vs. Corbin, 112 U. S. 36. Equally the jurisdiction could be maintained if the entire estate of a decedent were sued for. Nor would this be affected by the fact that when that entire estate should be recovered it would have to be divided among heirs whose individual shares would be less than $2,000. Overby vs. Gordon, 177 U. S. 214.

In McDaniel vs. Traylor, 196 U. S. 415, the relief sought was the removal of a cloud upon the title to all the real estate of a decedent. The heirs at law were permitted to unite their undivided interests though that of neither would separately exceed in value $2,000. The one title was to be cleared.

In Marshall vs. Holmes, 141 U. S. 589, it was held that as the several judgments at law obtained in a State Court, and which were sought to be enjoined as having been wrongfully obtained, were held in the same right and against the same person, and as their validity depended upon the same facts, the plaintiffs in said judgments might be united as defendants in one bill, although no judgment separately was for the jurisdictional amount. The fact was emphasized that the cases at law were practically one case, as all the plaintiffs in them had agreed to abide by the judgment in one of them.

In The Connemara 103 U. S. 754, joint claimants of a single salvage united in an action for its recovery, and were decreed $5,000. The jurisdiction was upheld, though the individual share of no one claimant, when the sum was divided by the decree, was sufficient in amount to have given the Circuit Court jurisdiction. In its opinion the court very significantly said that the claimants when suing had a common and undivided interest, and that it was immaterial to the other side how the entire fund was to be shared among
24 the claimants after it was obtained.

There are many other cases to the same effect, but we will only notice the two which appear to come most nearly to complainants' contention. In Clay vs. Field, 138 U. S., at page 479, after alluding to several cases directly and to others incidentally, the court stated the rule by which that and similar cases should be governed, as follows:—

"The general principle observed in all is, that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone. The principal cases in which the interest has been deemed common and undivided, and appeals have been sustained, are Shields vs. Thomas, 17 How. 3; Market Co. vs. Hoffman, 101 U. S. 112; The Connemara, 103 U. S., 754; The Mamie, 105 U. S. 773; Davies v. Corbin, 112 U. S. 36; Estes v. Gunter, 121 U. S. 183; and Handley v. Stutz, 137 U. S. 366."

In New Orleans Pacific Ry., vs. Parker, 143 U. S. 43, it was held that where the claims of several plaintiffs were united in the same bill, and the determination of the cause necessarily involved the validity of the title under which all claimed if the whole amount involved exceeds $5,000, the Supreme Court had jurisdiction.

If other cases had not furnished a guide for applying the general language used in some of the opinions in the cases we have referred to our difficulties would have been much increased. Coming to the second line of cases, we shall only notice two of them specifically. Many of the others are referred to in the opinions in those two.

In Russell vs. Stansell, 105 U. S. 303, it appears that lands in a particular district were assessed for taxation, each owner being liable only for the amount charged upon his land. It was held that the several persons thus assessed could not unite the several amounts assessed against them separately in order to make up the jurisdictional sum. Quite a number — other cases reassert this proposition.

In Walker vs. Northeastern Railroad Co., 147 U. S. 370, a bill was filed by the railroad company to enjoin the collection of taxes assessed against it by several counties acting separately but no one of which counties assessed taxes which amounted to $2,000. The Supreme Court held that the separate assessments could not be united for jurisdictional purposes, and that a separate suit must be brought against each county. At page 373 it was said:

"Is the plaintiff entitled to join them all in a single suit in a Federal Court, and sustain the jurisdiction by reason of the fact that the total amount involved exceeds $2000.? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, united for the convenience of litigation in a single suit, it can only be sustained in the Court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in Seaver vs. Bigelows, 5 Wall. 208; Russell v. Stansell, 105 U. S. 303; Farmers' Loan and Trust Co. vs. Waterman, 106, U. S. 265; Hawley vs. Fairbanks, 108 U. S. 543; Stewart v. Dunham, 115 U. S. 61; Gibson v. Shufeldt, 122 U. S. 27; Clay v. Field, 138 U. S. 464."

The general language used in the opinions in the various cases cited must, of course, be construed with reference to the facts of the particular case, and if at first blush there should appear to be difficulty in the premises, the key for its solution is found, as we think, in Illinois Central Railroad Co., vs. Adams 180 U. S. 28. There the railroad company filed its bill against Adams, a revenue agent of the State of Mississippi, to enjoin the collection of over $20,000 taxes assessed against it by the State railroad commission for the benefit of several counties. The Court below dismissed the bill for want of jurisdiction, but its decree was reversed. In its opinion the court, after referring to Walter vs. Northeastern R. R. Co., and other cases of that class, at page 40, said:

"These cases are quite distinguishable from those which hold that an action may be maintained for a lump sum, though such sum when collected may be subsequently distributed among various par-

ties, each receiving less than the jurisdictional amount.
26 Shields v. Thomas, 17 How. 3, 4; Rodd v. Heartt, 17 Wall. 354; The Connemara 103 U. S. 754; New Orleans Pacific Railway Co., vs. Parker, 143 U. S. 42."

We find in the part of the opinion which we have extracted what we conceive to be the test by which we may safely differentiate the principle upon which the two lines of cases to which we have referred, proceed. Where a lump sum, or what may be treated as such, is sued for, if it exceed $2000. the court has jurisdiction regardless of how the amount recovered may ultimately be distributed among the plaintiffs, but if each party plaintiff has a separate debt in which no other plaintiff has or can have any interest the separate claims can not be united to make up the jurisdictional amount. The case before us is not one in which a lump sum is sued for. It is one in which two separate debts belonging absolutely to two separate persons is each less than $2000. It is not one where a single fund is to be "distributed," nor one where the plaintiffs' claim "collectively," nor one in which they have a "Common and undivided interest." Here the "Common and undivided interest" is not in the indebtedness sued for, which is the principal thing, but is in the lien which is incident thereto. While a common and undivided interest in the indebtedness would, if it existed, sustain the jurisdiction, we think it must be otherwise where that sort of interest exists only in the mere lien. The amount in controversy, within the meaning of the judiciary Act, is the indebtedness and not the lien, and if the jurisdiction must be denied because the act does not authorize the adding together of the two separate debts of two different creditors in order to make up an amount sufficient to sustain the jurisdiction for the purpose of obtaining a judgment for the indebtedness, it necessarily follows that it can not be done to enforce a mere lien by which the indebtedness is secured. For these reasons we have concluded that this is not a case where the different plaintiffs can unite their
27 claims in order to make up the necessary $2000.

Upon the authorities we do not doubt that if the demand of either complainant exceeded $2,000, for convenience and economy both might have joined in this action to enfo-ce a lien in which they had an equal interest, although they could not have done so if judgments *in personam* only had been sought in a suit at law upon the notes. But where the claim of one complainant exceeds $2,000, or where a creditor, by his bill (as in Handley vs. Stutz, 137 U. S. 368) seeks to subject a trust fund exceeding in amount $2000. to debts which in the aggregate exceed that sum—in which case the jurisdiction is obvious—the joinder of other persons having other claims with him in a suit to enforce a common lien would become a mere question of equity practice and procedure, and not one of jurisdiction, the existence or non-existence of the latter not being dependent upon a mere misjoinder.

We, therefore, hold that the first and second grounds of demurrer should be sustained.

3rd. The third ground of demurrer is based upon other provisions of Section 1 of the present Judiciary Act (25 States. 433, 1st

Comp. States. 508.), which reads as follows: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

This proposition is, of course, jurisdictional in the broadest sense. It indeed excludes any complainant or plaintiff from access to the courts of the United States who is the assignee of a promissory note, unless either, first, such suit might have been brought by the assignor of the note, or, second, unless it was upon a foreign bill of exchange.

At least this is so so far as the provision applies to this case.
28 There is no averment in the bill which shows that Eigenmann could have sued here. When he transferred the note to the complainant, Biedenkopf, he may have been a citizen of Kentucky, and so he may have been when this action was commenced. Jurisdiction can not be inferred but must be expressly shown to exist before we can exercise it. These remarks apply especially to complainant Biedenkopf, but they might equally apply to the Troy Bank, unless it be conceded that its note has been placed upon the footing of a foreign bill of exchange by the law of Indiana. If they apply to either there would be only one of the complainants who could sue here, and as his claim alone would be less than $2,000. the jurisdiction might be defeated because of the express provision last referred to. On account of this defect the third ground of demurrer must also be allowed and sustained. The complainants may have leave to amend the bill so as to show the citizenship of Eigenmann both at the times of the transfers of the respective notes and at the time of the institution of this suit, and particularly the latter, if they desire to do so before the entry of a judgment dismissing the bill for want of jurisdiction. This might be important if there is a desire to appeal to the Supreme Court.

(Signed) WALTER EVANS, *Judge*.

Dec. 28th, 1910.

29 And on another day of said term of said court, viz., on the 11th day of January, A. D. 1911, the following proceedings were had, to-wit:—

This day came the complainants, by George W. Jolly, their counsel, and by leave of court filed their Amended Bill of Complaint herein. Came again the complainants by said counsel and filed their petition for rehearing herein.

The amended bill of complaint above referred to is as follows:

30 In the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division, *set:*

THE TROY BANK OF TROY, INDIANA, and JOHN BEIDENKOPF, Complainants,
against
THE G. A. WHITEHEAD COMPANY et al., Defendants.

Amended Bill of Complaint in Equity.

To the Honorable Judges of the Circuit Court of the United States for the Sixth Circuit and Western District of Kentucky, Owensboro Division:

The complainants, the Troy Bank of Troy, Indiana, and John Beidenkopf, come now and by leave of court amend their original bill of complaint herein, and for amendment thereto say that, the said Henry W. Eigenmann, the same mentioned in the original bill, the grantor in the deed to the said G. A. Whitehead, also mentioned in said bill, and the payee in the said two promissory notes set up and sued on in said bill, of $1200.00, each, was at the time of the execution of his said deed to said G. A. Whitehead, and at the time of the execution, by said Whitehead to said Eigenmann of said two notes of $1200.00 each, and also at the time of the assignment and transfer of each of said notes to the complainants respectively one to said Troy Bank and the other to said Beidenkopf, by said Eigenmann, as set out in said bill, and also at the time of filing the*m* original bill herein in this court, an actual resident and citize*h* of the State of Indiana, and that he is now an actual resident and citizen of said State of Indiana.

Wherefore, your orators pray as in the original bill of complaint herein.

THE TROY BANK OF TROY, INDIANA, AND JOHN BEIDENKOPF,
By GEORGE W. JOLLY,
Their Solicitor.

31 UNITED STATES OF AMERICA,
Western District of Kentucky,
Owensboro Division, set:

This day personally appeared before me, George W. Jolly, who being duly sworn says he is agent and solicitor for the complainants in the above styled suit, and that the complainants and each of them are absent from this district and division, and he further says that the facts set forth in the foregoing amended bill are true.

GEORGE W. JOLLY.

Subscribed and sworn to before me by George W. Jolly, on this 5th day of January, A. D. 1911.

A. G. RONALD, *Clerk.*

32 The Petition for rehearing referred to in the foregoing order is as follows:—

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division, *set:*

THE TROY BANK et al., Complainants,
vs.
THE G. A. WHITEHEAD COMPANY et al., Defendants.

Petition for Rehearing.

To the Honorable the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division:

The complainants herein conceiving themselves aggrieved by the orders and judgments made and rendered herein sustaining the demurrers to the jurisdiction of this court, and that the court has erred therein, comes now and respectfully prays the Court to reconsider its action herein, and overrule said demurrers, for the following reasons:—

1. The case cited by the court, of Watter vs. Northwestern Railroad Company, 147 U. S. 370, 373, is one of, and belongs to, a different class of cases from the case at bar. In that case, and all the cases of its class, the jurisdictional amount was attempted to be made by adding together sums arising out of separate and independent contracts or rights or actions. In that case, taxes were levied by four counties in South Carolina, each county by and through its own functionaries separately from any of the others. The tax to be paid by the Railway Company to no one of the counties, was sufficient in amount to give the court jurisdiction. It was sought to make up the jurisdictional amount by adding together the tax levied by each county, and it was held this could not be done, and in each
33 of the cases cited the same principle was applied. All those cases are clearly distinguishable from the case at bar.

2. The case at bar belongs to an entirely different category of cases, a category in which the Court has uniformly sustained its jurisdiction. If the complainants claim under the same right or title, though their separate claims are less than the jurisdictional amount, yet if when summed they exceed it, and the subject of the suit is to subject a fund or property, or enforce a lien, exceeding in amount or value the amount or value necessary to confer jurisdiction, the court's jurisdiction is complete. The test of the jurisdictional amount or value in the case at bar is the amount or value of the lien reserved in the deed, namely, $2400.00.

There are a large number of cases in which this principle has been applied. The following are examples:

Shields vs. Thomas, 17 Howard, 3, 4;
Rodd vs. Heartt, 17 Wallace, 354;
Market Co. vs. Hoffman, 101 U. S., 112;
The Connemara, 103 U. S., 754;

Freeman vs. Dawson, 110 U. S., 264;
Davis vs. Corbin, 112 U. S., 36;
New Orleans Railway vs. Parker, 143 U. S., 51;
Texas Railway Co. vs. Centry, 163 U. S., 361;

These are the principal cases, but there are a number of others;

It is believed the case at bar cannot be distinguished in any material respect from the case of Shields vs. Thomas, supra.

In that case the heirs of an intestate sued the personal representative to recover the amount of the estate which had been wasted, and recovered judgment. The Court decreed to each heir his — share, which was less than the jurisdictional amount, but the Court held that the test of its jurisdiction was the sum decreed in favor of all the heirs against the personal representatives. And doubtless the same rule would have been applied had there been a devise or deed of trust to the children jointly, and the executor or trustee had wasted the estate devised or placed in trust, and whether realty or personalty. In either case the complainants would have been necessarily claiming under the same title or right, and they would have had a common interest in the estate.

We respectively submit there can be no distinction drawn between judgments in personam or in rem, realty or personalty, be-
34 tween "sum" or "value"—if the sum or value is of the jurisdictional amount.

In the case at bar the vendor retained a purchase money lien (Ky. Stats. sec. 2358) on the realty conveyed, for $2400.00, and the unpaid purchase money was evidenced by the notes of $1200.00 each and those notes were assigned to complainants separately. The complainants necessarily claim under the same right or title a joint interest in the $2400.00 lien reserved. They have a common undivided interest in the lien on the realty for said sum of $2400.00, and we submit that the test of the court's jurisdiction, in this case, on the principle running through all the cases cited above, is the amount of the lien and this being in excess of $2,000.00, the jurisdiction of the Court is undoubtedly complete. And the complainants may join in the suit.

Wherefore, the complainants most respectfully pray the Court to set aside its orders sustaining the demurrers to its jurisdiction and to enter judgment overruling the demurrers.

THE TROY BANK AND
JOHN BEIDENKOPF.
By GEORGE W. JOLLY,
Their Solicitor.

THE TROY BANK OF TROY, INDIANA, and JOHN BIEDENKOPF,
Complainants,
vs.
G. A. WHITEHEAD and G. A. WHITEHEAD & COMPANY, Defendants.

And on another day of said term of said Court, viz., on the 17th day of January, A. D. 1911, the following proceedings were had, to-wit:

Now comes the defendant, The G. A. Whitehead Company, by its Attorney, J. D. Atchison, and refiles its demurrers to the bill of complaint as amended.

The demurrers above referred to are as follows:

35 Circuit Court of the United States for the Sixth Circuit, Western District of Kentucky, Owensboro Division.

THE TROY BANK OF TROY, INDIANA, and JOHN BIEDENKOPF, Complainants,

vs.

G. A. WHITEHEAD and G. A. WHITEHEAD & COMPANY, Defendants.

Demurrer of G. A. Whitehead and Company to Jurisdiction and to Complainants' Right to Maintain this Suit.

The Demurrers of the Defendant, G. A. Whitehead & Company, to the Jurisdiction of This Court and to the Right of Complainants to Maintain This Suit:

The defendant, G. A. Whitehead & Company, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true, in such manner and form as to the same are therein set forth and alleged, demurs to the said bill and for cause of demurrer says:

1.

That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit, and that the said bill does upon its face show that the value of the subject matter of the complaint is beneath the dignity of the Court, in that it does not show that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

2.

That it does plainly appear upon the face of the bill that this court has no jurisdiction of the sum sued for, in that the bill upon its face shows that the complainant, John Biedenkopf, sued upon a separate and distinct note or obligation for $1200.00 and no more, and
36 that the complainant, Troy Bank of Troy, Indiana, sues upon another separate and distinct note or obligation for $1200.00 and no more; and that separate decrees are in said bill prayed for by each of the complainants, and that it doeth also appear upon the face of said bill that the complainants have no joint interest in the two notes sued on.

3.

That it doeth plainly appear upon the face of said bill that neither of the notes sued on is placed upon, or is capable of being placed upon, the footing of a foreign bill of exchange under the statutes and

laws of the State of Indiana, in which State, it appears from said bill, they were executed and delivered, made payable and assigned, and hence, it doeth appear upon the face of said bill that H. W. Eiegenmann, the assignor of John Biedenkopf, could not have sued in this court upon the $1200.00 note assigned to him, neither could said Eigenmann, assignor of the Troy Bank of Troy, Indiana, have sued in this court upon the $1200.00 note assigned to it.

Wherefore, and for divers and other good causes of demurrer appearing in said bill this defendant demurs thereto and humbly demands the judgment of this Court whether it shall be compelled to make any further or other answer to said bill, and it prays to be hence dismissed.

J. D. ATCHISON,
Solicitor for Defendant G. A. Whitehead & Company.

I hereby certify that the foregoing demurrers are, in my opinion, well founded in point of law.

J. D. ATCHISON,
Solicitor for Defendant G. A. Whitehead & Company.

37 WESTERN DISTRICT OF KENTUCKY,
County of Daviess, ss:

Ben D. Ringo makes oath and says that he is the president of the above named defendant, G. A. Whitehead & Company, and that the foregoing demurrers are not interposed for delay and that the same are true in point of fact.

BEN D. RINGO.

Subscribed and sworn to before me this the 4th day of November, 1910.

[SEAL.] WALLACE ATCHISON,
Notary Public for Daviess County, Kentucky.

38 And on another day of said term of said Court, viz., on the 23rd day of January, A. D. 1911, the following order was entered, to-wit:

The Court being now sufficiently advised of the questions arising on the petition filed by the complainants for a rehearing on the demurrer to the original bill of complaint, overruled and denies the said petition.

And the Court being also sufficiently advised of the questions arising on the demurrer of the defendant, G. A. Whitehead & Co., to the bill of complaint as amended, it is ordered, adjudged and decreed that, inasmuch as the judgment of the Court on the demurrer to the original bill disposed of all the questions involved except those arising on the third ground of demurrer stated therein, the first and second grounds of demurrer stated in the demurrer to the bill as amended will be ignored and disregarded because heretofore disposed of, but as the defect suggested in the third ground of the original demurrer has been remedied by the amendment to the bill

of complaint, it is ordered, adjudged and decreed that the third ground of demurrer to the bill of complaint as amended should be and it is overruled.

And the Court being of opinion, notwithstanding the averments of the amended bill, that it has not jurisdiction of this action, it is now ordered, adjudged and decreed that this action should be and accordingly it is dismissed for want of jurisdiction in this court to hear and determine the same.

39 And on another day of said term of said court, viz., on the 6th day of February, A. D. 1911, the following proceedings were had to-wit:—

This day came the Complainants, Troy Bank of Troy, Indiana, and John Beidenkopf, by *its* solicitor, George W. Jolly, and moved the court to certify to the Supreme Court of United States the question of jurisdiction of the Circuit Court of the above entitled cause. Accordingly the Court now here certifies that as appears from its opinion and judgment herein this cause was decided altogether upon the question of the lawful power of this Court to hear and determine the same. And the question of whether or not this court has jurisdiction of the cause as made by the bill of complaint as amended is hereby certified to the Supreme Court of the United States for its decision under the provisions of Section five of the Act approved March 3, 1891, entitled "An Act to establish Circuit Courts of Appeals" etc.,

(Signed) WALTER EVANS, *Judge.*

And on another day of said term of said Court, viz., on the 13th day of March, A. D. 1911, the following proceedings were had, to-wit:—

This day came the complainants by George W. Jolly, their counsel, and filed a petition for an appeal and assignment of errors herein. Thereupon on motion of said complainants, it is ordered that an appeal be allowed to the Supreme Court of the United States herein upon condition that the complainant- do execute a bond in the penalty of Two Hundred ($200.00) Dollars conditioned according to law. Thereupon the said complainant, filed said bond with John Beidenkopf and D. W. Griffith as Sureties, which bond is now approved and ordered to be filed.

The petition for appeal above referred to is as follows:

40 In the Circuit Court of the United States for the Sicth Circuit and District of Kentucky, Owensboro Division, *sct:*

THE TROY BANK and JOHN BEIDENKOPF, Complainants,
vs.
THE G. A. WHITEHEAD COMPANY, Defendants.

Petition for Appeal.

The complainants, The Troy Bank of Troy, Indiana, and John Beidenkopf, conceiving themselves aggrieved by the orders and judgments herein, sustaining demurrers to the jurisdiction of the Court, and dismissing the bill of complainants herein, entered herein on the — day of —— 1911, and overruling complainants' petition for a rehearing, hereby appeal from said orders, judgments and decree to the Supreme Court of the United States, for the reasons and on the grounds set forth and specified in the Assignment of Errors, which is filed herewith, and said complainants pray that this appeal may be allowed and a complete transcript of the record, proceedings, petition for rehearing and all papers upon which said orders, judgments and decree *was* made may be sent to said Supreme Court of the United States.

GEORGE W. JOLLY,
Solicitor for Complainants.

41 The assignment of errors referred to in the foregoing order is as follows:—

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboro Division, *sct:*

THE TROY BANK and JOHN BEIDENKOPF, Complainants,
vs.
THE G. A. WHITEHEAD COMPANY ET AL., Defendants.

Assignment of Errors.

And now on this the — day of January, A. D. 1911, came the complainants, The Troy Bank of Troy, Indiana and John Beidenkopf by their Solicitor George W. Jolly, in the above entitled cause, and says that the decree, judgments and orders made and rendered in said cause, are erroneous, and against the just rights of said complainants, and contrary to law, for the following reasons, to-wit:—

First. Because the Court had full and complete jurisdiction of this cause, the amount involved being in excess and above the sum or value of Two Thousand Dollars, the object of the suit being to enforce a lien of $2400.00, on certain real estate situated in Owensboro, Kentucky, evidenced by two certain promissory notes of $1200.00 each, assigned by the payee to complainants separately, and inasmuch as complainants claim under the same right and title

they may join in the same suit and the test of the Court's jurisdiction *is* the whole amount claimed, and the amount of the lien sought to be enforced, against the land, on which was reserved; and the Court therefore erred in sustaining demurrers to its jurisdiction and dismissing the Complainants' bill.

Second. Because the Court erred in dismissing the complainants' bill on the ground it had not jurisdiction, or any ground.

42 The Court should have decided it had jurisdiction of the cause.

Third. Because the Court erred in overruling the complainants' petition for a rehearing and not setting aside its orders sustaining said demurrers and overruling the same.

Wherefore, the complainants pray that said orders, judgments and decrees be reversed and the Circuit Court directed to overrule said demurrers and set aside said decree dismissing complainants' bill.

THE TROY BANK OF TROY, INDIANA AND
JOHN BEIDENKOPF,
By GEORGE W. JOLLY, *Their Solicitor.*

The bond above referred to is as follows:

43 In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky, Owensboror Division, *sct:*

THE TROY BANK and JOHN BEIDENKOPF, Complainant-,
vs.
THE G. A. WHITEHEAD COMPANY, Defendant.

Bond.

Know all men by these presents, that we, The Troy Bank of Troy, Indiana and John Beidenkopf, as principals, and D. M. Griffith, as sureties, are held and firmly bound unto the defendant The G. A. Whitehead Company, in the full and just sum of two hundred Dollars to be paid to the said Whitehead Company, its successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 10 day of March, in the year one thousand nine hundred and eleven.

Whereas, lately, at a Circuit Court of the United States for the Western District of Kentucky, in a suit depending in said court, between The Troy Bank of Troy, Indiana and John Beidenkopf, Plaintiffs and the G. A. Whitehead Company defendant a judgment was rendered against the said plaintiffs The Troy Bank and said Beidenkopf, dismis-ing their bill herein for want of jurisdiction, and said plaintiffs The Troy Bank and said Beidenkopf, having been granted an appeal from said decree in the aforesaid suit, and a citation directed to the said G. A. Whitehead Company citing and admonishing it to be and apear at session of the Supreme Court of the United States to be holden at the City of Washington, D. C., at its next October term;

Now, the condition of the above obligation is such, that if the said Troy Bank of Troy, Indiana and John Beidenkopf shall prosecute said appeal to effect and answer all costs and damages if they shall fail to make said plea good, then the above obligations to be void, else to remain in full force and virtue.

44 (Signed) THE TROY BANK,
By J. B. HUFFMAN, *President.*
" JOHN BEIDENKOPF.
" D. M. GRIFFITH.

Sealed and delivered in presence of
A. G. RONALD, *Clerk,*
By M. E. DUNN, *D. C.*

45 UNITED STATES OF AMERICA,
Western District of Kentucky:

THE TROY BANK OF TROY, INDIANA, and JOHN BEIDENKOPF, Complainants,
vs.
THE G. A. WHITEHEAD CO., Defendants.

Affidavit.

This affiant, D. M. Griffith, states that he is surety on the bond hereto attached and that he is a resident of the county of Daviess and state of Kentucky and is owner of real and personal property, subject to execution and not exempt of value greater than one thousand dollars.

D. M. GRIFFITH.

Subscribed and sworn to before me by Daniel M. Griffith this 10th day of March, A. D. 1911.

M. E. DUNN,
Deputy Clerk.

46 WESTERN DISTRICT OF KENTUCKY,
Owensboro Division:

I, A. G. Ronald, Clerk of the Circuit Court of the United States for the Western District of Kentucky, at Owensboro, do hereby certify that the foregoing 45 pages contain a true and correct transcript of the record and proceedings had in the case of The Troy Bank of Troy, Indiana, et al. vs. G. A. Whitehead et al., No. 253, as the same appears from the records and files in my said office.

Witness my hand and seal of said Court, at Owensboro, this 30th day of March, A. D. 1911.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

A. G. RONALD, *Clerk,*
By HENRY F. CASSIN,
Deputy Clerk.

47 UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, Owensboro Division, ss:

To G. A. Whitehead & Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, D. C., on the* 22nd day of April, next, pursuant to an appeal allowed by the Circuit Court of the United States for the Western District of Kentucky, Owensboro Division, wherein The Troy Bank of Troy, Indiana, and John Biedenkopf, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 30th day of March, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty fifth.

[Seal 6th Circuit Court, Wes. Dist. Ky., U. S. of America.]

WALTER EVANS, *Judge.*

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* Not exceeding 30 days from the day of signing.

48 [Endorsed:] Received the within citation at Owensboro, Kentucky, April 7th, 1911, and served the same on the Appellee, G. A. Whitehead & Company, a corporation, by delivering a copy hereof to Benjiman D. Ringo, the President of the corporation, at Owensboro, Kentucky, on this 7th day of April, A. D. 1911.

GWO. W. LONG,
U. S. Marshal, Western District of Kentucky,
By C. T. NICHOLS,
Deputy Marshal.

Fee $2.00.

Endorsed on cover: File No. 22,614. W. Kentucky C. C. U. S. Term No. 993. The Troy Bank of Troy, Indiana, and John Beidenkopf, appellants, vs. G. A. Whitehead & Company, Filed April 10th, 1911. File No. 22,614.

Supreme Court of the United States

October Term 1910

No. 993

The Troy Bank of Troy Indiana and John Beidenkopf - Appellants

v.

G. A. Whitehead & Company, (Incorporated) - Appellee

Motion to Advance Under Rule 32 and Section 5 of the Act of March 3, 1891, Chapter 517

The appellants, The Troy Bank, of Troy, Indiana, and John Beidenkopf, by their counsel, pursuant to notice to appellee, G. A. Whitehead & Company, move the Honorable Court to advance this appeal for hearing, under Rule 32, and section 5, of the Act of March 3, 1891, chapter 517.

The only question involved on this appeal is the jurisdiction of the court below, which question is certified to this court pursuant to said section of said Act, and, the reason of dismissal appears also by the decree.

This bill in equity was filed for the purpose of enforcing a vendor's equitable lien on real estate, for a sum exceeding $2,000.00 evidenced by notes, each of which is for a sum less than that amount, and assigned to appellants respectively, who joined in the suit.

The court below dismissed the bill on the ground they could not be so joined and consequently the court had not jurisdiction.

Complainants below have prosecuted this appeal for the purpose of reversing that judgment.

Complainants both claim, under the same right and title, created at the same time, by the same instrument and contract, a deed, that they have an undivided and common interest in the one lien; that the real estate on which the lien exists is held in trust for the vendor and his assigns, to the extent of the lien, and that it is of no consequence to the appellee, and does not affect the jurisdiction of the court, that the proceeds arising from the sale of the realty will be divided between appellants.

George W Jolly

Attorney for Appellants.

Supreme Court of the United States

October Term 1910

No. 993

The Troy Bank of Troy Indiana and John Beidenkopf - Appellants

v.

G. A. Whitehead & Company, (Incorporated) - Appellee

Appeal from the Circuit Court of the United States for the Western District of Kentucky

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BRIEF AND ARGUMENT FOR APPELLANTS

Whether the Circuit Court had Jurisdiction of this Case is the Sole Question Involved on this Appeal

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STATEMENT

This bill in equity was filed in the Circuit Court of the United States for the Western District of Kentucky, at Owensboro, August 22, 1910, by the appellants, The Troy Bank, of Troy, Indiana, an Indiana corporation, and John Biedenkopf, also a citizen of the state of Indiana, against the appellee, G. A. Whitehead, and G. A. Whitehead & Company, the latter, a corporation created and organized under the laws of the state of Kentucky, for the purpose of enforcing a vendor's lien for $2,400.00 on certain real property situate lying and being in the

city of Owensboro, county of Daviess, and state of Kentucky.

On July, 18, A. D. 1908, one Henry W. Eigenmann and his wife, Grace, signed and delivered to G. A. Whitehead a deed conveying certain lots and parcels of ground therein described to the grantee, for a consideration set out, part of which was stated to be unpaid, as follows:

> "The grantor hereby reserves unto himself a vendor's lien on the above described real estate for $2,400.00, being the unpaid purchase money for this conveyance due in two equal installments in one and two years respectively, from the date hereof and bearing six per cent interest from date until paid, which unpaid purchase money is further evidenced by the two promisory notes of the grantee executed to the grantor, H. W. Eigenmann, agreeable in tenor, amounts and maturities to the lien herein reserved."

Afterwards, on September 28, 1909, said G. A. Whitehead and Bertha, his wife, signed and delivered to the appellee, G. A. Whitehead & Company, the same real estate conveyed to him by Eigenmann and wife.

The two deeds were seasonbly admitted to record in the clerk's office of the Daviess county court, certified copies of which are filed with the complainants' bill as parts thereof, marked respectively "C" and "D." (Transcript pp. 6 and 7.)

The two notes mentioned in the deed from Eigenmann to Whitehead as evidencing the vendor's lien for $2,400.00, due in equal installments in one and two years respectively, from date

are also filed with the bill as parts of it marked as exhibits "A" and "B." (Tr. 5 and 6.)

Both the notes were indorsed, sold and delivered to appellants by Henry W. Eigenmann on July 21, 1908, one to the Troy Bank and the other to appellant Biedenkopf.

The original vendee, G. A. Whitehead, having sold and conveyed the lots to the appelle, G. A. Whitehead and Company, is not a necessary party to the suit.

The object of the bill is to enforce this vendor's lien for the $2,400.00, of unpaid purchase money evidenced by the two notes held by complainants.

The defendant G. A. Whitehead & Company, filed November 7, 1910, a demurrer in three paragraphs. The first and second are substantially the same, namely, that the bill on its face shows that the amount sued for is beneath the jurisdiction of the court; that the claims cannot be united to make up an amount or value in excess of $2,000.00. The third is that it does not appear that the assignor could have sued upon the assigned notes. (Tr. 11, 12.)

The demurrers were sustained, and the complainants by leave of court filed an amendment to the bill alleging that Eigenmann was, at the time of the execution of the deed to Whitehead, and at the time of the execution by Whitehead to him of the two notes of $1,200.00 each, and at the time of the assignment and transfer of each of them to complainants, and at the time of filing bill herein, an actual resident and citizen of the state of Indiana. (Tr. 13, 20.)

The demurrers were refiled to the petition as amended and sustained; and the complainants' bill dismissed. (Tr. 24-25.)

A petition for a rehearing was filed by complainants and overruled. (Tr. 21, 22)

The court on motion of complainants certified to the Supreme court the question of jurisdiction. (Tr. 25.)

The complainants then filed a petition for an appeal which was granted, accompanied by an assignment of errors.

It is assigned that, the judgment of the circuit court is erroneous, because:

First. The court had full and complete jurisdiction of the cause, the amount involved being in excess and above the sum or value of $2,000.00, the object of the suit being to enforce a vendor's lien of $2,400.00 on certain real estate situated in Owensboro, Kentucky, evidenced by two notes of $1,200.00 each, assigned by the payee to complainants separately, and inasmuch as complainants claim under the same right and title they may join in the same suit; that the test of the court's jurisdiction is the amount or value of the *whole lien* sought to be enforced against the land on which it was reserved; and that the court erred in sustaining the demurrers to its jurisdiction and dismissing the bill.

Second. The court erred in not holding it had jurisdiction.

Third. The court erred in overruling the complainants' petition for rehearing.

That the question of the jurisdiction of the circuit court only, was involved in the decision from which this appeal is prosecuted appears by the decree, and, also, by the certificate of the court. (Tr. 25)

The appeal is taken under section 5 of the Act of March 3, 1891, Ch. 517, 26 St. L. 826 See, Huntington v. Laidley, 176 U. S. 676; and Loveland on Appelate Jurisdiction, Sec. 108.

By section 9, of the Act of February 12, 1901, 32 St. L. 58, the places for holding the Circuit and District courts in the Western District of Kentucky, are fixed, and by section 10, it is provided:

> That the terms of said courts shall not be limited to any particular number of days, nor shall it be necessary to adjourn by reason of the intervention of a term elsewhere, but the court intervening may be adjourned until the business of the court in session is concluded." 4 Fed. St. Ann. 707, 708.

ARGUMENT

I.

The suit is for the enforcement of the vendor's lien for $2,400.00, evidenced by two notes of $1,200.00 each, reserved in the deed from Eigenmann to Whitehead, on the lots therein conveyed, situated in the city of Owensboro, Kentucky.

It is not for the recovery of a judgment in *personam* on the notes, but to enforce the lien, whether it is an equitable lien, or a lien created by contract; to enforce the trust therefor, by a judicial sale of the lots, and a distribution of the proceeds arising from the sale to the lien holders *pro rata*.

The sole question involved on this appeal is whether or not the amount or value of the lien is within the jurisdiction of the circuit court?

The appellants contend that the test of the court's jurisdiction is the amount or value of the vendor's lien reserved in the deed.

The appellee contends the test is the amount of each note *separately*, and that, the notes being owned separately, and not jointly, by two different persons, cannot under such circumstances be joined in one suit for the enforcement of the *one single lien* existing on the land, to secure their payment.

The appellants contend that the lien, being created at one and the same time, by one contract, evidenced by the same instrument, a deed, is a single thing or entity, that the fact that two notes were executed for the total amount of the lein as evidence of it, and that the notes are owned by two persons separately, is not material, does not affect the jurisdiction of the court and does not concern the defendant. The complainants sue in the same right, claiming under the same title, created at the same time and by the same contract, that is, by the same deed.

The circuit court, appellants contend, assigned this case to a class to which it does not belong; to a class of cases wherein an attempt was made to unite in the same suit for making up the jurisdictional amount, claims arising out of different or separate contracts, or different rights, or different acts, having no connection with each other. And ignored the fact that, the suit is to enforce a trust for $2,400.00, against real estate.

The equitable lien is a separate and distinct right and may be enforced in equity when the legal remedy may be lost. Belknap v. Gleason, 11 Conn. 160, 27 Am. Decs. 721 and note. Brizzel v. Nix, 60 Ala. 281, 31 Am. Rep. 38.

II.

This court in the case of Fisher Shropshire, 147 U. S. 133, 139, in which was involved the enforcement of a vendor's lien on real estate under the laws of Iowa, said:

> "The courts of the United States enforce grantor's and vendor's liens if in harmony with the jurisprudence of the state in which the action is brought, and the principle upon which such a lien rests has been held to be that one who gets the estate of another ought not in conscience to be allowed to keep it without paying the consideration. Chilton v. Braiden's Administratrix, 2 Black 458; Story's Equity Juris. Sec. 1219."

See also S. & S. Gold Mines v. Seymour, 153 U. S. 509, 516; and Story's Equity Juris. Secs. 1217 to 1221.

It is now, and has been the law of Kentucky from the foundation of the state, that a vendor of land has an equitable lien on the land for the unpaid purchase money, and that the vendee becomes a trustee for his vendor therefor.

In Vorhies v. Instone 3 Bibb 353, 354, (1814) the Court of Appeals said:

> "It has heretofore been held, and may now be considered the settled doctrine of the court, that where a vendor takes no other security from the vendee, he retains an equitable lien on the land in the hands of the

> vendee, whether a conveyance has been made or not, for the consideration remaining unpaid. For if the vendee receives a title without having made payment by an equitable construction a trust results to the vendor, and the vendee is considered as holding the land subject to the trust."

There has never been any modification of the old equitable rule on this subject except by the passage of a statute, which may be found in the present revision, as follows:

> "When any real estate shall be conveyed, and the consideration, or any part thereof, remains unpaid, the grantor shall not have a lien for the same against *bona fide* creditors and purchasers, unless it is stated in the deed what part of the consideration remains unpaid." Ky Stats. Sec. 2358.

This statute does not alter the lien law as it previously existed, it simply prescribes a mode of legal notice to creditors and purchasers.

It is effective only between a vendor and creditors and purchasers of the vendee. As between vendor and vendee the lien for unpaid purchase money is enforcible though the amount thereof be not stated in the deed. Ross v. Adams, 13 Bush 370 and Brown v. Ferrel, 83 Ky. 417.

It is alleged in the bill that the deed from Eigenmann to Whitehead was recorded in the clerk's office of the Daviess county court, July 20, 1907. (Tr. 4.)

The deed from Whitehead to the appellee, G. A. Whitehead & Co., was executed September 28, 1909. (Tr. 9.) Appellee therefore had notice of the lien sought to be enforced in this suit. Mueller v. Englin, 12 Bush 441.

The counterpart of the foregoing doctrine of equitable lien has also always been the law in Kentucky, namely, that when a rescission of a contract for the sale of land is decreed, the vendee is allowed a lien on the land sold for the money paid as the purchase price with interest. Bibb v. Prather, 1 Bibb 313, (1809); Bullitt v. Land Co., 99 Ky. 324.

A vendor's lien for unpaid purchase money is a creature of the courts of equity; it is not known and its obligation is not enforcible at law; the remedy for its enforcement is alone in equity. When it it not discharged the mode of enforcing it is by a suit in equity and a judicial sale of the property to which it is attached. To the extent of the lien the vendee becomes a trustee for the vendor; he, and his vendees who have notice of it, hold the estate in trust for the discharge of the lien. It attaches to the land as a trust. Story's Eq. Juris. Secs. 1217 to 1220.

In Kentucky the vendor's lien has never been considered as personal to the vendor and has always been held to be assignable; and the assignee of the debt may enforce the lien in his own name. Ripperdon v. Cozine, 8 B. Mon. 466; Burns v. Roulhac, 2 Bush 39; Duncan v. Louisville, 13 Bush 378 and Bradley v. Curtis, 79 Ky. 327.

> "If several notes which constitute the vendor's lien upon land are assigned at different times to different persons, priority of assignment gives no priority of

right; but the lien secures the several notes *pro rata*, as in the case of successive assignments of notes secured by a mortgage." Jones on Liens, Sec. 1097. Stockton v. Johnson, 6 B. Mon. 408.

III.

What effect shall be given to the above quoted recitation or stipulation in the deed from Eigenmann? Is it to be construed as nothing more than a compliance with the statute, *supra*, or, as the express reservation of a lien by contract? Under the laws of the state the vendor had a lien on the land conveyed for the amount of the unpaid purchase price in the absence of any statement of the amount or any express reservation of a lien. But, if he desired to protect himself against the creditors and purchasers of his vendee, he was required to state the amount of the unpaid price in the deed. If the express reservation of a "vendor's lien" for $2,400.00 is mere surplusage, then the equitable lien attached as it would have done if there had been merely a bare statement that that amount of the price was unpaid. If, however, those words are not surplusage, then perhaps the lien is created by a contract which, in legal effect, is a mortgage, and the vendee then occupies the position of a mortgagee and holds the estate in trust for his vendor the same as if the lien arose by operation of law. Story's Equity Juris. Sec. 1013.

"The grantor hereby reserves unto himself a vendor's lien," are the words employed by the grantor in the deed. A "vendor's lien" under the laws of Kentucky is an equitable

lien attaching by operation of law, on the ground that it is contrary to good conscience to allow one to buy an estate in land and not pay for it. Accepting the vendor's own words as descriptive of the character of lien he meant should exist on the land for the unpaid part of the price he meant, necessarily, the equitable lien under the law of Kentucky. And, of course, this entitles him to the remedies which the laws of the state afford for the enforcement of the trust assumed by the original vendee in his favor, and for his benefit, and the appellee stands in the original vendee's stead.

IV.

The jurisdiction of the circuit court is sustainable upon several grounds: first, because the complainants seek to enforce a lien in excess of the jurisdictional value or amount, in which they have a common undivided interest, their right, being derived from a common source, created by the same contract; they claim under the same title, created at the same time, by the same instrument; and, secondly, they are the sole beneficiaries under a trust created in their favor for a sum above the jurisdictional limit growing out of the same transaction and created by the same instrument.

We will now cite several decisions of this court which we earnestly insist support our contention:

Shields v. Thomas, 18 Howard 3, 5, was a suit by the legal representatives of an intestate against one who seized upon and converted the estate to his own use. A decree was rendered against the wrongdoer for a considerable sum of money, which

was apportioned among the heirs according to their respective interests. The appellant was ordered to pay to each of the heirs a specific sum. The whole amount recovered against appellant Shields, exceeded $2,000.00, but the sum allotted to each heir was less than that amount. Two thousand dollars was at that time the limit upon the appellate jurisdiction of the court. A motion was made by the heirs to dismiss the appeal, which was overruled.

The court, by Chief Justice Taney, held that the matter in controversy was the sum due to the representatives of the decedent collectively; not the particular sum to which each was entitled when the whole amount recovered was distributed among them according tot he laws of the state. This is exactly appellant's contention in this case.

The court in that case said:

> "They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to appellant how it was to be shared among them. He had no controversy with them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.
>
> It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds $2,000.00 an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

The court after elaborating the argument cites and distinguishes some preceding cases, among them, Oliver v. Alexander, 6 Peters 143, which was a suit for seamen's wages cited by appellee on the motion to dismiss. The court said although the crew are allowed for the sake of convenience and to save costs, to join in a suit for wages, yet the right of each seaman is separate; that his recovery does not depend upon the recovery of the others, but rests on its own merits. And he does not recover a portion of a common fund to be distributed among the claimants, but the amount due to himself on his own separate contract. This case has been cited and approved many times.

Rodd v. Heartt, 17 Wallace 354, was a case where a steamer had been sold in a proceeding in the admiralty and there was left in court the sum of $4,337.51 which was claimed on the one hand by Rodd and other creditors of she owners, who by one mortgage on the vessel had undertaken to secure all these creditors, and on the other hand by Heartt and others, mariners, material men, etc. The claim of Rodd under the mortgage was $4,825.00, and his co-mortgagees over, (in the aggregate,) $8,000.00. The claims of the opposing mariners were $10,000.00. Rodd and his co-mortgagees appealed. The opinion is very brief but taken in connection with the statement of the facts and the grounds upon which the motion to dismiss the appeal was based, it plainly appears that the motion was overruled because the aggregate of the claims under the one mortgate exceeded the jurisdictional amount though no one of them was equal to that amount.

The total amount of the claims under the mortgage was held to be the test of the jurisdiction of the court and the motion overruled, obviously on the ground that they all claimed under

one and the same title; that they had a common and undivided interest in the lien created by the mortgagee and that it was perfectly immaterial to the opposing parties how the fund was shared among the claimants.

The case of New Orleans Pacific Railway v. Parker, 143 U. S. 42, 51, 52, is another case where a motion to dismiss on the ground that the jurisdictional amount was not involved, and was overruled. There is a statement of many facts that are immaterial here. It is deemed sufficient to say that a mortgage was executed to a trustee to secure a large amount of bonds with interest coupons attached. The mortgage provided that, upon condition broken, any holder of bonds or coupons might sue to enforce the mortgage lien. Parker sued to enforce the lien and recover the amount due him on coupons of two bonds and recovered $2,400.00. He sued on behalf of himself and other holders of bonds. On appeal to this court Parker moved to dismiss. In disposing of this motion the court said:

> "Where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, this court has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed $5,000.00."

The court cites and comments on the cases of Shields v. Thomas, *supra*, Rodd v. Heartt, *supra*, The Connemera, 103 U. S. 754, Davies v. Corbin, 112 U. S. 36 and Handley v. Stutz, 137 U. S. 366 and then adds:

> "The true distinction is between cases in which there are several plaintiffs interested collectively under a common title, and those wherein the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy."

There are many other cases which belong to the same class and have been decided upon the same principle, but it is deemed unnecessary to do more than append a list of the more important:

Market Company v. Hoffman, 101 U. S. 112; The Mamie, 105 U. S. 773; Freeman v. Dawson, 110 U. S. 264; Estes v. Gunter, 121 U. S. 183; Marshall v. Holmes, 141 U. S. 589; Texas Railway v. Gentry, 163 U. S. 361; Overby v. Gordon, 177 U. S. 214; McDaniel v. Taylor, 196 U. S. 415; Morgan v. Adams, 211 U.S. 627.

V.

We respectfully submit that the learned court below erred in holding the complainants could not join is this suit to enforce the lien; that it is obvious in the light of the foregoing authorities that they may be so joined, because they have a common and undivided interest in the lien and in the fund to be realized by an enforcement of the lien and a sale of the realty, the amount or value of the lien being over two thousand dollars.

The learned court held that this case belonged to that class of which Walter v. Northeastern Railroad Co., 147, U. S. 370, is one, and in which many of the others are cited. But we think

that case can be easily distinguished from the case at bar. In that case the assessing officers of several different counties, in South Carolina, being separate and distinct municipalities, each acting through its own officers, and in no wise connected with each other in the matter of assessing property for taxation, within their respective corporate limits, levied taxes according to their respective needs. The state board of railroad commissioners increased the valuation on the railroad's property. The amount of taxes due from the road to the county of Charleston was $177.67; to the county of Berkeley $1,511.16, to the county of Williamsburg $1,332.50, and to Florence county $571.33, making a total of $3,592.66.

The railroad company brought one bill in equity to enjoin the collection of all these taxes against the treasurers and sheriffs of each of the counties. The circuit court overruled the demurrers to the bill. The case on appeal to this court was reversed and remanded with directions to dismiss it for want of jurisdiction.

The reasons assigned by the court are stated as follows:

> "Is the plaintiff entitled to join them all in a single suit in a Federal court, and sustain the jurisdiction by reason of the fact that the total amount involved exceeds $2.000.00? We think not. It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and that when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the

joint or several character of the liability to the plaintiff. This was the distinct ruling of this court in Seaver v. Bigelows, 5 Wall. 208; Russell v. Stansell 105 U. S. 303; Farmers' Loan and Trust Co. v. Waterman, 106 U. S. 265; Hawley v. Fairbanks, 108 U. S. 543; Stewart v. Dunham, 115 U. S. 61; Gibson v. Shufeldt, 122 U. S. 27; Clay v. Field, 138 U. S. 464."

The court also cites and applies the cases of Stratton v. Jarvis, 8 Peters 4; Spear v. Place, 11 Howard 522; Paving Co. v. Mulford, 100 U. S. 147, Schwed v. Smith 106 U. S. 188; Henderson v. Wadsworth, 115 U. S. 264 and Ex-parte Insurance Co. 117 U. S. 367.

The claim of each county for the tax due to it was a several, separate and distinct claim, in its own right: and inasmuch as the amount of tax due to no one county exceeded the sum of $2,000.00, the court held they could not be joined for the purpose of making up the jurisdictional amount.

The learned court below seems to rest its decision also upon the case of Illinois Central Railroad Co. v. Adams, 180 U. S. 28, 39, 40. We respectfully submit that the questions involved in that case were altogether different from the question here presented. The court stated the questions to be (1) diversity of citizenship; (2) absence of any federal question; and (3) that there was no jurisdiction because the suit was against the State in violation of the eleventh amendment of the constitution?

The question whether the amount in controversy was sufficient to sustain the bill in that case was not certified by the circuit court. The amount of taxes in litigation exceeded $20,000.00.

The court does however discuss the question and points out the distinction for which we are contending and instead of modifying the rule affirms it. The circuit court in the case at bar, we respectfully submit, misapplies the language of Justice Brown to the *amount of each note*, whereas, our contention was, and is, that it is the *the amount of the lien*, the enforcement of which is sought by the bill, that controls; and that, the amount of the lien being $2,400.00, the jurisdiction is complete.

Nothing can be added by way of statement or argument to what this court has repeated several times in the different cases in stating the distinction between the two classes of cases.

We have endeavored to show that the case at bar belongs to the class in which Shields v. Thomas is one of the leading cases; and that it does not fall within the class to which the court below assigned it, the principal cases of which are cited by Justice Brown in the opinion in Walter v. Northeastern Railroad Co., *supra*.

We therefore, respectfully submit, that upon the authorities cited herein the judgment appealed from is erroneous and that the circuit court had jurisdiction of this cause.

Wherefore, appellants humbly pray a reversal.

GEORGE W. JALLY,
ATTORNEY FOR APPELLANTS.

B. F. HUFFMAN,
OF COUNSEL.

8-10-11.

Supreme Court of the United States

October Term 1911

No. 993

The Troy Bank of Troy Indiana and John Beidenkopf - Appellants

v.

G. A. Whitehead & Company - Appellee
(Incorporated)

Appeal from the Circuit Court of the United States for the Western District of Kentucky

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BRIEF AND ARGUMENT FOR APPELLEE

I.

THE CONTENTION OF APPELLANTS.

Learned counsel for the appellants has, in his brief, correctly stated the matter at issue here.

The only question involved upon the appeal is: Did the Circuit Court have jurisdiction?

One of the appellants, the Troy Bank, holds a note executed

by G. A. Whitehead for $1,200.00. The other complainant, John Beidenkopf, holds another note executed by the same person and at the same time for $1,200.00. Each of these notes is secured by a lien upon the same real estate lying in the City of Owensboro, Kentucky.

It is not contended that the parties to the litigation are not citizens of different States. It is contended that the Circuit Court was without jurisdiction because the amount involved as to each appellant (the complainants below) was not sufficient to give jurisdiction.

It was so held by the Judge of the Circuit Court for the Western District of Kentucky, and the petition dismissed, and complainants have appealed.

The two notes held by the two appellants are not negotiable instruments. The Negotiable Instrument Law is not in force in the State of Indiana. Under the law of that State a promissory note can not be placed upon the footing of a foreign bill of exchange so as to cut off the equities of the maker of the note or others, except it be made payable at some incorporated Bank in the State of Indiana. An examination of the notes in the record will disclose that they are each payable, not at an incorporated Bank, but at the office of H. W. Eigenmann, Rockport, Indiana.

Hence it might well result, as it would in this case, that the defendants would have entirely separate and distinct defenses to bring forward against the two claims.

It is true a lien exists upon the same real estate to secure each of these notes. This is true by Statute in Kentucky, and such a lien is enforceable in a proper suit in equity. We do not agree, however, that the owner of the real estate is in any

sense a trustee or holds the estate any wise in trust for the vendor or the assignees of the notes.

It will be observed that appellants have cited a line of cases in which complainants were the holders of some *common undivided interest*, or where the one title involved was the question to be determined. Thus in Shields vs. Thomas, 18 Howard, 235, the Court will perceive the contest arose between the heirs of John Goldsbury on the one side and those who had wrongfully taken and appropriated an estate in Kentucky belonging to these heirs, on the other. The suit was for the body of this estate in its entirety, and the opinion of the Court by Mr. Justice Daniel upon the question of the amount in controversy says:

> "But the Court think the matter in controversy in the Kentucky Court was the sum due to the representatives of deceased collectively, and not the particular sum to which each was entitled when the amount due was distributed among them according to the laws of the State. They all claimed under one and the same title. *They had a common and undivided interest in the claim.* . . . . . " (Italics ours.)

The case of Rodd vs. Heartt, 17 Wall. 354, cited by appellants, is in no wise in point. The Court in its opinion in that case refuses to dismiss on demurrer, for the reason given in the opinion, to-wit:

> "Second, it is apparent that, though no one of the claims allowed exceeded $2,000.00, yet the claim of the appellants, which was disallowed exceeded that sum."

OOR COPY

So in the case of New Orleans Pacific Railway Company vs. Parker, 143 U. S. 42, cited by appellants, this Court by Mr. Justice Brown tries to point out to litigants and to the bar the exact distinction applicable in the case at bar. In that case Parker filed his bill, "for himself and for all other parties holding bonds and coupons similar to those herein set forth," against certain Railroad companies to foreclose a mortgage made to secure the bonds held by Parker and others. The answer set forth that the mortgagors had no title to the land embraced in the mortgage. A determination of the issues in that case necessarily settled the rights of each bondholder represented by Parker in the suit. The Court in that case distinctly holds that in such a state of case several claims may be joined to give the amount requisite to jurisdiction.

> "Where several plaintiffs claim under the same title, and determination of the cause necessarily involves the validity of that title, the Court has jurisdiction as to all such plaintiffs though the individual claims of none of them exceed $5,000.00. . . . . .
>
> "The true distinction is between cases in which there are several plaintiffs interested collectively under a common title, and those wherein the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy."

In that case this Court clearly points out the difference between the class of cases referred to by the appellants herein, and

the class to which the notes involved here properly belong. In the one, where the plaintiffs who may join hold a *common and undivided interest* in the fund or property in Court, and in the other where their claims are separate and distinct and are joined in one suit merely for convenience or economy. Can there be any doubt in the case at bar that the claim of the Troy Bank is separate and distinct from that of John Beidenkopf?

II.

THE CONTENTION OF APPELLEE.

Appellee contends that the appellants, each holding a claim for less than $2,000.00, could not unite in one action, although their claims together amount to more than $2,000.00; that each party joined as an appellant must himself have a claim, exclusive of interest, sufficient in amount to give the Court jurisdiction; and that it makes no difference that the two claims are secured by lien upon the same real estate. The same principle applies in case of defendants who are joined and sought to be made liable on separate demands and for different amounts. The only exception, we think, to this rule is found where the Federal Court of Chancery has rightfully acquired jurisdiction to administer an insolvent estate, in which case it may permit all persons holding claims against such estate to present them in the same action, although some be less than the jurisdictional amount.

In the case of Rich vs. Bray, 37 Fed. Rep. 273, 2nd L. R. A. 225, certain heirs sought to join in the same complaint seeking

to recover their several interests in an estate. Judge Phillips, of the Western District of Missouri, clearly points out in that case the distinction which we are seeking to draw. After pointing out that distinction, the Court says:

> "This bill, as already stated, is framed upon the theory that a portion of the heirs entitled to distribution may maintain the action for the recovery of their respective proportions, bringing the case directly within the rule established by the authorities cited. In the *Tax levy* case the judgment creditors have no common fund existent until after levy and collection; whereas in the case at bar the fund already existed before suit, of which each complainant is entitled to a definite portion. The demurrer to the bill on this ground is well taken."

The fact that there exists a lien to secure the two claims set forth in the complaint is a mere incident and can not operate to confer jurisdiction. There can, of course, be no such thing here as a *joint lien*. If other equities had intervened, and the Bank knew it, then the lien claimed by the Bank might be defeated; while the other complainant might have an enforceable lien for his debt.

In Seaver vs. Bigelows, 5 Wall. 208, the Court discusses this question, and among other things it is said:

> "It is true the litigation involved a common fund, which exceeds the sum of $2,000.00; but neither of the

judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute, of an amount less than the Statute requires, and where the joinder of the parties is permitted by mere indulgence of the Court, for its convenience, and to save expense, would be giving a privilege to the parties not common to other litigants and which is forbidden by law."

In Hawley vs. Fairbanks, etc., 108 U. S. 543, certain holders of judgments against the municipality sought mandamus requiring the clerk to extend upon the Tax books of the town a sum sufficient to pay each of the several judgments held by the relators. Some of these judgments were for less than the jurisdictional amount; others were greater. The Court answering the question, whether these judgments could be united to give jurisdiction, says:

"The rule is settled, as stated more than once at the present term, that when distinct causes of action, in favor of distinct parties, are united in one suit, and distinct judgments are rendered for or against the several parties, their judgments can not be joined to give us jurisdiction. . . . . The proceeding was analogous to a creditor's bill brought by distinct creditors upon distinct judgments to reach the property of their common debtor. That was the case of Schwed vs. Smith, supra, in which we held, following Seaver vs.

> Bigelows, 5 Wall. 208, that the amount due the several creditors could not be joined to give jurisdiction on an appeal by the defendants."
>
> Schwed vs. Smith, 106 U. S. 188.

This Court in the case of Gibson vs. Schufeldt, 122 U. S. 27 has collected many authorities bearing upon the question presented in the case at bar. Although Mr. Justice Gray in beginning the opinion in the Gibson case and discussing the motion to dismiss for want of jurisdiction, because the complainants each held a claim less than the jurisdictional amount, says: "The question presented by this motion can hardly be considered an open one," yet he then proceeds to again discuss the question raised in the case at bar. On Page 39 in that opinion it is said citing Henderson vs. Wadsworth, 115 U. S. 264:

> "Neither co-defendants nor co-plaintiffs can unite their separate and distinct interests for the purpose of making up the amount necessary to give this Court jurisdiction upon a writ of error or appeal."

To the same effect is Farmers Loan & Trust Company vs. Waterman, 106 U. S. 265.

It being remembered that the same rule as to jurisdiction applies upon appeal as upon original jurisdiction in the lower Court, this Court has distinctly stated the rule in Clay vs. Field, 138 U. S. 464. Many authorities are there referred to, and the Court says:

> "The general principle observed in all is, that if several persons be joined in a suit in Equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such district demands or liabilities can not be aggregated together for the purpose of giving this Court jurisdiction by appeal, but each must stand or fall by itself alone."

To the same effect are Walter vs. Northeastern R. R. Co. 147 U. S. 370; Hassell, Trustee, vs. Wilcox, etc., 115 U. S. 598.

In Eaton et al. vs. Hoge et al. 141 Fed. Rep. 64, the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Judge Carland cites with approval the opinion in Clay vs. Field, *supra;* and many cases bearing upon this question, both from this Court and from the circuits are collected in an elaborate note to Eaton vs. Hoge in 5 Am. & Eng. Annotated Cases at page 489.

We submit that the case at bar is properly to be assigned to that class of cases wherein the claims of complainants are separate and distinct in their nature. If right in this, we shall contend that the rule is well established and uniform; that where claims are in their nature separate and distinct they can not be joined to give jurisdiction, although the State Statute under

which the right of action arises might allow a joinder of the causes. And where two or more parties may thus join as a matter of convenience and to prevent multiplicity, in one action, for the ascertainment and distribution of their respective interests in a common fund, the interest of each independent of the other must exceed the sum of $2,000.00 to give jurisdiction.

Holt vs. Bergevin, 60 Fed. Rep. 1;
Rich vs. Bray, 37 Fed. Rep. 273;
Stemmler vs. McNeill, 102 Fed. Rep. 660;
Putney vs. Whitmire, 66 Fed. Rep. 385;
Hagge vs. Kansas City St. R. Co. 104 Fed. Rep. 391.
Busey vs. Smith, 67 Fed. Rep. 13;
Auer vs. Lombard, 72 Fed. Rep. 209.

Just as a party holding diverse citizenship may in good faith purchase claims severally less than $2,000.00, but aggregating more than that sum, from persons similarly situated, and thus acquire the right to sue in the Federal Court, so may one thus situated and holding claims sufficient to give the Circuit Court jurisdiction, divest himself of that right by selling and assigning some part of his claim so as to reduce the remainder in his hands below $2,000.00. We assume it will not be contended that under the Act of August 13th, 1888, (25 Stat. 433, Sec. 1), regulating the jurisdiction of the Circuit Courts, Eigenmann could have sold one of these notes in suit, and then brought suit in the Circuit Court upon the other one. The Act provides that the Assignee can not sue in the Federal Court unless his assignor

could have sued there. Engenmann was Beidenkopf's assignor as to one note of $1,200.00, but as to nothing else. Eigenmann could not have sued on this $1,200.00 in the Federal Court; so likewise Beidenkopf can not sue upon it. The same is true as to the Troy Bank.

We respectfully submit that the learned trial Judge did not err in his opinion that the Circuit Court was without jurisdiction in this case. The appellee humbly prays the Court for an affirmance.

BEN D. RINGO,
Attorney for Appellee.